# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 70.

ELIZABETH C. OULD, JOHN E. SIMONTON, ELIZABETH C. BEARDSLEY, HANNAH P. JACKSON, SAMUEL SIMONTON, ABNER C. P. SHOEMAKER, DAVID S. SIMONTON, AND PIERCE SHOEMAKER, PLAINTIFFS IN ERROR,

vs.

THE WASHINGTON HOSPITAL FOR FOUNDLINGS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 3, 1875.

# SUPREME COURT OF THE UNITED STATES.

## No. 70.

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ELIZABETH C. OULD, JOHN E. SIMONTON, ELIZABETH C. BEARDSLEY, HANNAH P. JACKSON, SAMUEL SIMONTON, ABNER C. P. SHOEMAKER, DAVID S. SIMONTON, AND PIERCE SHOEMAKER, PLAINTIFFS IN ERROR,

vs.

THE WASHINGTON HOSPITAL FOR FOUNDLINGS.

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IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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*a* In the supreme court of the District of Columbia.

ELIZABETH C. OULD AND OTHERS
*v.*
WASHINGTON HOSPITAL FOR FOUNDLINGS. } At law. No. 11375.

It is admitted by the defendant that the lots described in the plaintiffs' declaration, and claimed by them, exceed in value the sum of ten thousand dollars.

WALTER S. COX,
*Att'y for Defendant.*

*b* In the supreme court of the District of Columbia, the 11' day of August, 1874.

ELIZABETH C. OULD, ELIZABETH C. BEARDSley, Samuel Simonton, Abner P. Simonton, David S. Simonton, John E. Simonton, Hannah P. Jackson, Eliza F. Tibbets, Abner C. P. Shoemaker, and Pierce Shoemaker,
*vs.*
WASHINGTON HOSPITAL FOR FOUNDLINGS. } At law. No. 11375. In error.

Know all men by these presents that we, Abner C. P. Shoemaker, Pierce Shoemaker, & Elizabeth C. Ould, are bound unto the above-named Washington Hospital for Foundlings in the sum of five hundred dollars, to be paid to the said Washington Hospital for Foundlings and its successors; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 11th day of August, 1874.

Whereas the above-named Elizabeth C. Ould, Elizabeth C. Beardsley, Samuel Simonton, Abner P. Simonton, David S. Simonton, John E. Simonton, Hannah P. Jackson, Eliza F. Tibbets, Abner C. P. Shoemaker, and Pierce Shoemaker hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Elizabeth C. Ould, Elizabeth C. Beardsley, Samuel Simonton, Abner P. Simonton, David S. Simonton, John E. Simonton, Hannah P. Jackson, Eliza F. Tibbets, Abner P. C. Shoemaker, & Pierce Shoemaker shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ABNER C. P. SHOEMAKER. [SEAL.]
PIERCE SHOEMAKER. [SEAL.]
ELIZABETH C. OULD. [SEAL.]

Sealed and delivered in presence of—
O. D. BARRETT.
M. DORIAN.

Approved.

D. K. CARTTER,
*Chief-Justice.*

Filed Aug. 13, 1874.
REC. 70—1

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Elizabeth C. Ould, John E. Simonton, Elizabeth C. Beardsley, Hannah P. Jackson, Samuel Simonton, Abner C. P. Shoemaker, David S. Simonton, & Pierce Shoemaker, as plaintiffs, and Washington Hospital for Foundlings as defendant, at law, No. 11375, a manifest error hath happened to the great damage of the said plaintiffs, as by their complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Morrison R. Waite, Chief-Justice of the United States, this 14th day of August, in the year of our Lord 1874, and of the Independence of the United States the ninety-ninth.

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Washington Hospital for Foundlings:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Elizabeth C. Ould and others are plaintiffs and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, chief-justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
*Ch'f-Just.*

Service acknowleged.

W. S. COX,
*Att'y for Defendant.*

AUG. 14*th*, 1874.

(Indorsed:) Ould et al. v. Washington Hospital for Foundlings. Writ of error and citation. Filed Sep. 15, 1875. R. J. Meigs, c'k.

2 The answer of the chief-justice and justices of the supreme court of the District of Columbia to the foregoing writ of error is in the words following, to wit:

3 In the supreme court of the District of Columbia, the 8th day of October, 1873.

*Declaration.*

ELIZABETH C. OULD, ELIZABETH C. BEARDSley, Samuel Simonton, Abner P. Simonton, David S. Simonton, John E. Simonton, Hannah P. Jackson, Eliza F. Tibbetts, Abner C. P. Shoemaker, Peirce Shoemaker,
*vs.*
WASHINGTON HOSPITAL FOR FOUNDLINGS. } At law. No. 11375.

The plaintiffs sue the defendant to recover fourteen lots or pieces of ground, part of square numbered two hundred and seven, of the city of Washington, District of Columbia, being lots numbered from twenty-four to thirty-seven, both inclusive, on a certain plan of subdivision of the said square, registered and recorded in the office of the surveyor of said Washington, in liber W. F., folio two hundred and eleven, situated on the east side of Fifteenth street northwest, commencing for the same at a point on the east line of said Fifteenth street, one hundred and sixty feet north of the southwest corner of said square, running north on said line of said Fifteenth street one hundred and thirty feet; thence east two hundred and ninety-four feet and a half inch, to Johnson avenue; thence south along the west line of said Johnson avenue one hundred and thirty feet; thence west two hundred and ninety-four feet and a half inch, to the place of beginning, including a twenty-foot alley, laid out north and south, between said lots, of which the plaintiffs were lawfully seized in their demesne, as of fee, on the fourth day of April, in the year of our Lord one thousand eight hundred and seventy-two, when the defendant entered the same and unlawfully ejected the plaintiffs therefrom, and unjustly detains the same from the plaintiffs.

And the plaintiffs claim the possession of the said lots and premises, with the appurtenances and cost of suit.

O. D. BARRETT,
A. K. BROWNE,
*Attorneys for Plaintiffs.*

The defendant is to plead hereto on or before the first special term of this court occurring twenty days after service hereof; otherwise, judgment.

O. D. BARRETT,
A. K. BROWNE,
*Attorneys for Plaintiffs.*

(Endorsed:) Filed Oct. 9, 1873. R. J. Meigs, clerk.

*Plea.*

4 Supreme court, District of Columbia.

ELIZABETH C. OULD ET AL.
*vs.*
WASHINGTON HOSPITAL FOR FOUNDLING. } 11375.

The defendant says it is not guilty as alleged.

W. S. COX,
*Attorney for Defendant.*

(Endorsed:) Filed Oct. 21, 1873. R. J. Meigs, clerk.

*Joinder in issue.*

In the supreme court of the District of Columbia, the 22d day of Oct., 1873.

ELIZABETH C. OULD ET AL.
*vs.*
WASHINGTON HOSPITAL FOR FOUNDLINGS. } At law. No. 11375.

The plaintiffs hereby join issue on the defendant's plea.

O. D. BARRETT,
*Of Counsel for Plaintiffs.*

(Endorsed:) Filed Oct. 22, 1873. R. J. Meigs, clerk.

5 *Statement of facts.*

In the supreme court of the District of Columbia, the 18th day of April, A. D. 1874.

ELIZABETH C. OULD AND OTHERS
*vs.*
WASHINGTON HOSPITAL FOR FOUNDLINGS. } At law. No. 11375.

It is admitted by the defendant, the Washington Hospital for Foundlings, in the above-entitled cause—

First. That Joshua Peirce, late of the District of Columbia, died on the 11th day of April, A. D. 1869.

Second. That the said Joshua Peirce died seized of the real estate set forth and described in the plaintiffs' declaration.

Third. That the plaintiffs, Elizabeth C. Ould, Elizabeth C. Beardsley, Samuel Simonton, Abner P. Simonton, David S. Simonton, John E. Simonton, Hannah P. Jackson, Eliza F. Tibbetts, Abner C. P. Shoemaker, and Peirce Shoemaker, are the heirs at law and the only heirs at law of the said Joshua Peirce, deceased.

It is admitted on the part of the plaintiffs—

First. That Joshua Peirce, on the 15th day of October, A. D. 1867, duly executed his last will and testament, commencing as follows:

"I, Joshua Peirce, of the county of Washington, in the District of Columbia, do make this my last will and testament in manner and form following."

That following this is a revocation of other wills, then provision for payment of debts, then several specific devises, and then the fourteenth item, of which the following is a copy:

"Fourteenth. I give, devise, and bequeath all those fourteen certain lots or pieces of ground, part of square numbered two hundred and seven, situate between R and S streets north and Fourteenth and Fifteenth streets west, in the said city of Washington, in the District of Columbia; which lots are numbered from number twenty-four to number thirty-seven, inclusive, on a certain plan of subdivision of the said square, registered and recorded in the surveyor's office for the said city, n liber W F, folio 211, and are situate on the east side of the said Fifteenth street, at the distance of one hundred and sixty feet northward from the north side of the said R street north, containing together in front on the said Fifteenth street west one hundred and thirty feet, and in depth eastward between parallel lines two hundred and ninety-four

feet and a half inch, more or less, to Johnson avenue, (including in the said depth a twenty-feet-wide alley, laid out through the middle of the said lots,) to my friends, William M. Shuster and William H. Claggett, both of the said city of Washington, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, in trust nevertheless, and to, for, and upon the uses, intents, and purposes following, that is to say: In trust to hold the said fourteen lots of ground with the appurtenances as and for a site for the erection of a hospital for foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by an act of Congress as and for such hospital, and upon such incorporation upon further trust to grant and convey the said lots of ground and trust estate to the corporation or institution so incorporated for the said purpose of the
6 erection of a hospital, which conveyance shall be absolute and in fee: Provided, nevertheless, that such corporation shall be approved by my said trustees, or the survivor of them, or their successors in the trust, and if not so approved, then upon further trust to hold the said lots and trust estate for the same purpose until a corporation shall be so created by act of Congress which shall meet the approval of the said trustees, or the survivor or successors of them, to whom full discretion is given in this behalf; and, upon such approval, in trust to convey as aforesaid; and I recommend to my said trustees to select an institution which shall not be under the control of any one religious sect or persuasion; and until such conveyance I direct the taxes, charges, and assessments, and all necessary expenses of, for, and upon the said lots, and every one of them, to be paid by my executors, as they shall from time to time accrue and become due and payable, out of the residue of my estate."

That following this is a devise of the "rest, residue, and remainder" of the testator's estate, "real and personal, including his estate called Linnaean Hill," in trust to trustees for the use of the testator's wife's nephew in tail with a devise over.

Second. That on the 22d day of June, 1864, the said will was fully proved and admitted to probate in the orphans' court of the District of Columbia.

Third. That on the 22d day of April, A. D. 1870, Congress passed an "act for incorporating a hospital for foundlings in the city of Washington," for the terms of which act reference is had to 16 U. S. Statutes at Large, page 92, and that on the 4th day of April, A. D. 1872, said Shuster and Claggett, trustees, conveyed the property described in the declaration to the defendant, The Washington Hospital for Foundlings, so incorporated in conformity with the directions of said will, the property being the same as described in the above devise.

It is hereby stipulated that, on the facts above admitted, this case may be certified to the supreme court of the District of Columbia, sitting in general term, for hearing in the first instance; and that if the said court shall hold that the said devise in the said fourteenth item of the said will is void, judgment shall be entered for the plaintiffs; but if the said court shall hold that the said devise is valid, judgment shall be entered for the defendant, and that neither party shall be considered hereby to have waived his right of appeal to the Supreme Court of the United States.

O. D. BARRETT,
*Attorney for Plaintiffs.*
WALTER S. COX,
*Attorney for Defendant.*

7 *Order sending case to gen'l term.*

Order of circuit court, Monday, April 20, 1874.

Session resumed pursuant to adjournment. Chief-Justice Cartter presiding.

ELIZABETH C. OULD, JOHN E., SAMUEL P., Abner P., & David S. Simonton, Eliza C. Beardsley, Hannah P. Jackson, Eliza F. Tibbetts, Abner C. P. Shoemaker, and Pierce Shoemaker, pl'ffs,
*v.*
THE WASHINGTON HOSPITAL FOR FOUNDLINGS, def't. } At law. No. 11375.

At the request of the parties, by their respective attorneys, it is ordered that this case be heard in the general term in the first instance.

8 *Argued.*

MONDAY, *May* 17, 1874.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter and Justices Olin, Wylie, Humphreys, and MacArthur.

ELIZABETH C. OULD AND OTHERS, PLAINTIFFS,
*vs.*
WASHINGTON HOSPITAL FOR FOUNDLINGS, DEFENDANT. } At law. No. 11375.

Argued by Mr. Barrett for plaintiff, and Mess'rs James M. Johnston and Walter S. Cox for defendant. Argument to be concluded tomorrow by M'r Barrett.

TUESDAY, *May* 19, 1874.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter and Justices Olin, Wylie, Humphreys, and MacArthur.

ELIZABETH C. OULD AND OTHERS, PLAINTIFFS,
*vs.*
WASHINGTON HOSPITAL FOR FOUNDLINGS, DEFENDANT. } At law. No. 11375.

Argument resumed and concluded by M'r Barrett for plaintiffs.

Judgment of court in general term.

9 SATURDAY, *June* 20, 1874.

Session resumed pursuant to adjournment. Present, Justices Olin, Wylie, Humphreys, and MacArthur. Absent, Chief-Justice Cartter.

ELIZABETH C. OULD, ELIZABETH C. BEARDSLEY, Samuel Simonton, Abner P. Simonton, David S. Simonton, John E. Simonton, Hannah P. Jackson, Eliza F. Tibbetts, Abner C. P. Shoemaker, & Pierce Shoemaker, plaintiffs,
*v.*
WASHINGTON HOSPITAL FOR FOUNDLINGS, DEFENDANT. } No. 11375.

And now come here as well the plaintiffs as the defendant, by their

respective attorneys; and thereupon, because it appears to the court here that the devise in the aforesaid agreed facts and stipulation mentioned is valid,

Therefore it is considered that the plaintiffs take nothing by
10 their suit; and that the defendant go thereof without day, and recover against the plaintiffs the costs of its defense, to be taxed by the clerk, and have execution thereof.

*Authentication of record.—Clerk's certificate.*

CLERK'S OFFICE, *Supreme Court of the District of Columbia:*

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 19th day of September, 1874.

[SEAL.] R. J. MEIGS, *Clerk*,
By JOB BARNARD, *Assistant Clerk.*

(Indorsement on cover:) No. 70. Elizabeth C. Ould, John E. Simonton, Elizabeth C. Beardsley, Hannah P. Jackson, Samuel Simonton, Abner C. P. Shoemaker, David S. Simonton, & Pierce Shoemaker, plaintiffs in error, *vs.* The Washington Hospital for Foundlings. District of Columbia sup. court. Filed 3 May, 1875.

SUPREME COURT OF THE UNITED STATES.

ELIZABETH C. OULD, ET AL.,
*vs.*
WASHINGTON HOSPITAL FOR FOUNDLINGS.
*No.* 70.

*Supplemental [redacted] Record, filed by consent of Counsel.*

I, Joshua Pierce, of the County of Washington, in the District of Columbia, do make this my last will and testament, in manner and form following: hereby expressly revoking all wills by me heretofore made, (except a will dated on the twenty-second day of August, Anno Domini, one thousand eight hundred and sixty-seven, of which this is simply a duplicate.)

Thirteen. I give, devise and bequeath, the northern moiety, or equal half part of all, and singular, my tract or square of ground number two hundred and six, in the City of Washington, in the District of Columbia; bounded by R and S streets, north, and by Fourteen and Fifteenth streets, west, to my friends, the said John B. Blake and Moses Kelly, of the said city, and the survivors of them, and the heirs, executors, administrators and assigns, of such survivor, in trust, nevertheless, and to, for, and upon the uses, intents and purposes following, that is to say; in trust to hold the same, and to let and demise the whole or any part thereof, for such term as they may think proper, and to collect the rents, issues, and profits thereof, and after paying out of the same all taxes, charges and other expenses of the trust, to pay over the remaining nett income, rents, issues, and profits, when, and as the

same shall be received, to Mrs. Helen B. Phillips, wife of Doctor James Phillips, now of the said City of Washington, for her sole and separate use, for and during the term of her natural life, and upon her own proper receipt, but in such way and manner that the same shall not be liable to the control, debts, contracts, or engagements of her present husband or of any future husband she may have or take, and without any power on her part of anticipation or alienation.

And upon further trust, by and with the consent and approbation of the said Helen B. Phillips (to be testified in writing or by her executing or joining in the conveyance) from time to time to sell the whole or any parts of the said trust estate, for such price or prices as the said trustees or the survivor of them may think proper; and to execute proper conveyances and deeds of the same to the purchaser or purchasers thereof, free and clear of any liability on the part of the purchaser or purchasers to see to or be responsible for the application, non-application, or misapplication of the purchase-money; and upon receipt of said purchase-money and every part of the same, to invest the same in good securities, or in bonds and mortgages, and to collect the interest and income thereof, and to pay and apply the same in the same manner and for the same purposes and subject to the same restrictions and trusts as are above provided for, and respecting the rents, issues, and profits of the premises sold; the said income in every case being substituted for the said rents, issues, and profits, with power, nevertheless, in case of partial sale, to apply the principal of the purchase-money, or so much of the same as may be required, to the payment of the taxes or of any charges on the said trust estate or any part of the same, or the improvement, by way of building or otherwise, of the unsold portion of the trust estate: Provided, that the said trustees shall only be responsible for wilful fraud or for

gross negligence, and not for any loss incurred in the discharge of their duty or discretion. And from and immediately upon and after the death of the said Helen B. Phillips, then upon further trust to hold the said trust estate and property converted and unconverted, and all investments of the same, to and for the use of such of the children of the said Helen B. Phillips (including her son, Charles B. Simpson,) as may then be living, and the lineal descendants of such of them as may then be dead, in equal shares in fee and absolutely; such lineal descendants, nevertheless, taking, and equally dividing among themselves such share only, as his, her, or their parents or ancestor, being a child of the said Helen B. Phillips, would have taken if living at the time of her death: and in case the said Helen B. Phillips, should die without leaving any child, children or lineal descendants, living at the time of her death, then upon further trust to hold one-third of the said trust estate and property, and of the investments of the same, to and for the absolute use and benefit of the Episcopal Female Orphans' Society of the City of Washington. One other third part of the same for the same uses and purposes, provided in the next succeeding or fourteenth clause of this, my will, to be conveyed to the trustees therein, or their successors in the trust, and the remaining one-third part, for such uses and purposes as are hereinafter provided for, and concerning the residue of my estate, and as if forming part of such residue.

Fifteenth. I give, devise, and bequeath all the rest, residue, and remainder of my estate, real and personal, including my estate called Linnœan Hill to my said friends, John B. Blake and Moses Kelly, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, in trust nevertheless, and to, for, and upon the uses, intents, and purposes following, that is to say, in trust to hold such part of the said re-

siduary property as shall consist of real estate, and to collect the rents, issues, and profits thereof, (with power to lease the same) and to hold, invest, and keep invested such part of the said residue as shall consist of or be converted into personal estate, and to collect the income and profits thereof, and of such investments, (with power to change investment and re-invest,) and after paying all charges, taxes, assessments, and dues upon such residuary real and personal estate, and all expenses and commissions of the said trust and all necessary repairs of real estate, to pay over all the balance of the said rents, issues, income, and profits to my late wife's nephew, Joshua Pierce Klingle, when and as the same shall accrue and be received, for and during the term of his natural life, for his support and maintenance and the maintenance of his family for and during the term of his natural life, but in such way and manner that the same shall not be liable to his debts, contracts and engagements, and without power on his part of anticipation or alienation; and from and immediately after the death of the said Joshua Pierce Klingle, then, upon further trust to hold the whole of the said residuary estate, real and personal, and all investments thereof, to and for the use of such of the children of the said Joshua Peirce Klingle as may then be living, and the issue and lineal descendants of such of them as may then be dead, in equal shares in fee and absolutely; such issue and lineal descendants, nevertheless, taking and equally dividing among themselves, such share only, as his, her or their respective parent or parents, ancesstor or ancestors, a child or children of the said Joshua Pierce Klingle, would have taken, if living at the time of his death. But if the said Joshua Pierce Klingle shall die without leaving any child, children, issue, or lineal descendants living at the time of his death, then, upon such death of the said Klingle, to hold two entire equal third parts of my said residuary

estate, real and personal, to, and for the absolute use of such of my own right heirs and next of kin, as may then be living, in equal shares per stirpes; and to hold the remaining equal third part of my said residuary estate, real and personal, to, and for the absolute use of such of the right heirs and next of kin of my late wife, Susan Ann Pierce, (formerly Coates,) as may then be living, in equal shares, per stirpes.

Lastly, I nominate and appoint my said friends, John B. Blake and Moses Kelly, and the survivors of them, to be the executors and executor of this, my last will and testament, and I authorize and empower them, and the survivor of them, whether as executors or as trustees under any of the foregoing provisions of this will, to sell and convey all or any part of my real estate, (except the lots devised in trust for a foundling asylum,) upon such terms, either for cash or credit, as they or the survivors of them may think best, and to execute all necessary deeds and conveyances, upon such sale or sales, to the purchaser or purchasers, free and clear of all liability on their part to see to or be responsible for the application, non-application, or mis-application of the purchase-money, or to let any part of the said real estate (except as aforesaid) on ground rent; and such powers shall extend to any administrator with this will annexed.

In witness whereof, I have hereunto set my hand and seal this fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-seven.

[SEAL.] JOSHUA PIERCE.

# Supreme Court of the United States.

## October Term, 1877.

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ELIZABETH C. OULD AND OTHERS,
PLAINTIFFS IN ERROR,

*vs.*

WASHINGTON HOSPITAL FOR FOUNDLINGS,
DEFENDANT IN ERROR.

*No. 70.*

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BRIEF FOR PLAINTIFFS IN ERROR WITH AN APPENDIX CONTAINING THE OPINION DELIVERED IN THIS CAUSE BY THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

*O. D. BARRETT,*
*BENJ. F. BUTLER,*
*Counsel for Plaintiffs in Error.*

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WASHINGTON, D. C.:
TURNER & CO., PRINTERS, WEBSTER LAW BUILDING.
1877.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1877.

ELIZABETH C. OULD, ET AL.,
PLAINTIFFS IN ERROR,
*vs.*
WASHINGTON HOSPITAL FOR FOUNDLINGS,
DEFENDANT IN ERROR.

No. 70.

## STATEMENT OF THE CASE.

This is a suit of ejectment brought to recover fourteen lots in the city of Washington, D. C.

The plaintiffs in the court below, now plaintiffs in error, claim the lots as heirs at law of Joshua Peirce deceased. The defendant claims them under the said Peirce's will, the fourteenth item of which is as follows:

"I give, devise and bequeath all those fourteen certain lots or pieces of ground, part of a square numbered two hundred and seven, situate between R and S streets north and Fourteenth and Fifteenth streets west, in the said city of Washington, in the District of Columbia; which lots are numbered from number twenty-four to number thirty-seven inclusive, on a certain plan or subdivision of the said square, registered and recorded in the Surveyor's office for the said city, in liber W. F., folio 211, and are situate on the east side of the said Fifteenth street, at the distance of one hundred and sixty feet northward from the north side of the said R street north, containing together in front on the said Fifteenth street west one hundred and thirty feet, and in depth eastward between parallel lines two hundred and ninety four feet and a half inch, more or less, to Johnson

avenue, (including in the said depth a twenty-feet-wide alley, laid out through the middle of the said lots,) to my friends, William M. Shuster and William H. Claggett, both of the said city of Washington, and the survivor of them and the heirs, executors, administrators and assigns of such survivor, in trust nevertheless, and to, for, and upon the uses, intents and purposes following, that is to say: In trust to hold the said fourteen lots of ground with the appurtenances as and for a site for the erection of a Hospital for foundlings, to be built and erected by any association, society or institution that may hereafter be incorporated by act of Congress as and for such hospital, and upon such incorporation upon further trust to grant and convey the said lots of ground and trust estate to the corporation or institution so incorporated for the said purpose of the erection of a hospital, which conveyance shall be absolute and in fee: Provided, nevertheless, that such corporation shall be approved by my said trustees, or the survivor of them, or their successors in the trust, and if not so approved, then upon further trust to hold the said lots and trust estate for the same purpose, until a corporation shall be so created by an act of Congress, which shall meet the approval of the said trustees, or the survivor or successors of them, to whom full discretion is given in this behalf; and upon such approval, in trust to convey as aforesaid, and I recommend to my said trustees to select an institution which shall not be under the control of any one religious sect or persuasion; and until such conveyance, I direct the taxes, charges and assessments and all necessary expenses of, for, and upon the said lots, and every of them, to be paid by my executors, as they shall from time to time accrue and become due and payable out of the residue of my estate."

Following this item is a devise of the "rest, residue and remainder" of the testator's estate, "real and personal, including his estate called Linnaean Hill," in trust to trustees for the use of the testator's nephew in tail with a devise over.

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By an agreed statement of facts, (Record p. 4) filed in the court below, a jury trial was dispensed with, the cause certified to the General Term for hearing in the first instance under a stipulation of counsel that judgment should be entered for the plaintiffs, or defendant, accordingly as the court should hold the devise void, or valid. (R. p. 4.)

The devise was held valid and judgment was entered for the defendant.

## ASSIGNMENT OF ERRORS.

The court below erred in holding:

FIRST.

That the devise was an immediate gift to charity. (v. opinion, line 27.)

SECOND.

That in respect to gifts for charity there is to be no application of the rule as to perpetuites unless it appears on the face of the will itself, that under no circumstances was it the intention of the testator that his bequest should operate till after the expiration of the time prescribed by the rule. (v. opinion, line 123.)

THIRD.

That the devise is void neither on the ground of perpetuity nor for the uncertainty of its object. (v. opinion, line 205.)

FOURTH.

That in no event was there to be a resulting trust to the heirs. (v. opinion, line 230.)

FIFTH.

That the devise was made in favor of a corporation which should be created by Congress within the period permitted by the law for the vesting of an executory devise in the ordinary case of an individual. (v. opinion, line 245.)

SIXTH.

That the devise in question is valid. (v. opinion, line 249.)

### I.

The first error assigned is that the court below held the devise in question to be an immediate gift to charity.

It is, or it is not, a gift to the Washington Hospital for Foundlings. If it is a gift to that Hospital then how can it be an *immediate* gift to it, the Hospital not being in existence at the time of the gift? It was absolutely necessary in some way to bridge the time between the gift and the erection of the Hospital. The devisor accomplished this by appointing two trustees and "the survivor of them, and the heirs, executors, ad-

ministrators and assigns of such survivor" (ante, line 25,) to execute the gift whenever Congress should bring into existence the Hospital. To call such a gift immediate, is to pervert language and insult common sense, in view of the plain fact that the devisor appointed the trustees, not to *dispense* his gift, but to *convey* to the beneficiary, the fee which his own death would prevent him from doing in person, in case it should occur previous to the incorporation of the said Hospital by Congress.

Instead of the gift being immediate the devisor makes it contingent, not only on the future incorporation being created by Congress, but also on his trustees approving that corporation when so created.

But an estate in fee, created by will, to commence *in futuro*, contingent on an event that may, or may not happen, is an executory devise. On this point the authorities are unanimous.

Cruise says:

"It has been stated that by the rules of the common law, no remainder could be limited over after a limitation in fee simple, nor a freehold created to commence *in futuro*.

But the indulgence shown to testators in effectuating their intentions, however untechnically expressed, induced the judges to dispense with these rules, in cases of wills, as well as in limitations of uses, and also to allow similar dispositions of terms for years, in wills and in deeds, declaring the trusts of such terms."

"Dispositions of this nature are called *executory devises*." Greenleaf's Cruise on Real Property, Vol. 3, title 38, chap. 17, sec. 1, and part of sec. 2.

Redfield says:

"As a remainder cannot be limited to take effect after an estate in fee simple, every limitation over, upon the conditional determination of an estate in fee simple, must take effect as an executory devise. As where an estate is given to A, in fee simple, but conditioned that if he shall die before twenty-one, without leaving issue, and B shall then be alive, then over it is regarded the same as if the devise had been made to take effect over, or in future, without any intermediate devise in fee, the fee descending in the meantime to the heir, thus operating by way of executory devise." 2 Redfield on Wills, chap. II, sec. 17, par. 7.

Williams says:

"Perhaps the first instance of the creation of an executory interest, occurred in directions given by testators, that their executors should sell their tenements." * * * * * *

"In such cases, it is evident that the sale by the executors operated as the execution of a power to dispose of that in which they themselves had no kind of ownership." * * * "The fee simple was shifted away from the heir of the testator, to whom it had descended, and became vested in the purchaser on the event of the sale of the tenement to him." * * * "The passing of the statute of uses, abolished for a time all wills of uses, until the statute of wills restored them. When wills were restored, the uses of which they had been accustomed to dispose, had been all turned into estates at law; and such estates then generally came, for the first time, within the operation of testamentary instruments." * * * "Future estates at law were also allowed to be created by will, and were invested with the same important attribute of indestructibility which belongs to all executory interests. These future estates were called executory devises." Williams on real property, 290, 291.

Powell says:

"Although the law will not recognize a remainder to take effect after the expiration of a fee, yet by way of indulgence to a man's last will and testament, and in favor of the intention of devisors, where otherwise the words of a will would be void, it permits, under certain restrictions, a fee, or other estate, to be substituted as an alternative in the place of a fee before limited; provided the substitution be to take effect within a reasonable period of time. Devises of this nature are called *executory*, because the estates thereby limited to take place by way of substitution have *no present* existence, in consideration of law, but merely a capacity of existence, and of being executed; *i. e., taking effect when* the contingency upon which they are limited occurs" Powell on Devises, 250.

In another place he says;

"A still further distinction has been taken as to equitable trusts, upon the circumstance of a conveyance being directed to be made by the trustees or not; for where the trustees have been directed by the instrument creating the trust to execute a conveyance of the legal estate they have been deemed executory trusts as in the case of Hopkins and Hopkins before mentioned, (Atk. 581,) but where no further or other conveyance is directed to be made by the trustees, but the trust is left on the declaration or limitation in the original instrument, to take effect as

that operates in legal construction these have been deemed trusts executed, not by the statute, but by the party creating them, they requiring no further conveyance to give them effect." Powell on Devises, 287.

Chief Justice Shaw says:

"There are two kinds of executory devises; one, where an estate is devised to one, but upon some future event that estate is determined, and the estate thereupon is to go to another; the other, when the estate is limited to commence *in futuro*, contrary to the rules of the common law. In the latter case, the fee in the mean time remains in the heir of the devisor." *Nightingale* vs. *Burrell*, 15 Pick., 104.

Applying these definition to the devise to the Washington Hospital for Foundlings, no doubt is left of its being an executory devise, and not an *immediate gift.*

Again if the gift to the future Hospital was not an *immediate* gift to charity, was there an estate which could properly be called *an immediate* gift to charity, vested by the will in the trustees, Shuster and Claggett, to commence on the death of the testator, and to continue till the future corporation should be created and approved by the trustees and the lots in question conveyed to it in fee absolute? If so, then the trustees, Shuster and Claggett, are the almoners of that gift. But their duties are by the will confined solely to selecting a corporation and making to it a conveyance. They are not even charged with the care of the property, the devisor having devolved that on his executors by the following clause of his will: "and until such conveyance, I direct the taxes, charges and assessments and all necessary expenses of, for and upon the said lots and every of them, to be paid by my executors as they shall from time to time accrue and become due and payable out of the residue of my estate." (Ante, line, 47.) The objects of the devisor's charity were foundlings, but what foundling could the trustees, Shuster and Claggett, aid by the sole means of a naked power to select a future corporation and convey the lots to it? These vacant lots could afford no shelter to a foundling. The trustees could not build the hospital; that was, according to the language of the will, "to be built and erected by any association, society, or institution that may hereafter be incorpor-

ated by act of Congress." (Ante, line 30.) The conveyance is to be made "to the corporation or institution so incorporated, for the *said purpose of the erection of a hospital*," (Ante, line 35,) thus clearly showing that the trustees are not to hold the property even during the erection of the hospital. The estate, then, that arose immediately on the death of the testator had no characteristic of a charitable estate.

It follows therefore that the immediate devise to the trustees was not a *gift* to charity, and that the *charitable estate* intended for the future incorporation was not an *immediate* gift.

The court below classed this case with five English cases referred to in the opinion, line 29, *et seq.* in which gifts to charity had been sustained; but an examination of those cases will show;

First. That the case we are now considering cannot be classed with any of them.

Second. That the law applied to those cases is not applicable to this.

The cases will be examined in the order in which reference is made to them in the opinion.

The first is the case of *Sinnett* vs. *Herbert*, L. R., 7 Ch., 240.

The testatrix bequeathed to her executors "£3000 to be by them applied in aid of an endowment of a Welsh Church now in course of erection at Aberystwith," and the rest and residue of her estate, subject to certain expenses and legacies, she also bequeathed to her executors upon trust, "to be by them appropriated in aid of erecting, or endowing an additional church at Aberystwith aforesaid."

Here is certainly an immediate gift for charity, and the executors are themselves the almoners of the charity. Had those executors been required to hold the £3000 and the residue until the English Parliament should have created a certain corporation to endow and erect churches in the old town of Aberystwith, and then to transfer the same to such corporation thus to be created, to be used as aforesaid, the case would have been similar to the one before the court. But then it would not have been an *immediate* gift to charity. To make

it like our case it is necessary to interpose between the testatrix and the distributors of her charity, an estate not intended for any charitable use at any time during its continuance.

The next is the case of the *Attorney General* vs. *the Bishop of Chester*. 1 Brown Ch. 444.

The testator left £1000 " for the purpose of establishing a Bishop in the King's dominions in America."

It is left to the very persons who are to establish the Bishop, not to certain parties to hold till Parliament should incorporate a Bishop establishing missionary society, to which, when so incorporated, the said £1000 should be transferred.

And here again we find it necessary to inject into this English case an estate, not charitable, between the testator and the distributors of his bounty in order to make it similar to the one now before the court.

In the case *of Chamberlain* vs. *Brockett* L. R., 8 Ch., 206, the testatrix bequeathed all the rest, residue and remainder of her estate to trustees to make out of the proceeds certain annual payments for charitable purposes, and as soon as land shall at any time be given, to build certain alms houses and to make certain weekly allowances to the inmates.

Here the charitable estate vests at once in the testatrix' immediate trustees, and simple directions are given how to use it when some other party shall see fit to vest in them lands for certain specified purposes.

If the testatrix' trustees had been required to hold the bequest till land from some other party should be given to some specified corporation, to be afterwards created for building alms houses and thereupon to transfer to it the said bequest, we would have a case somewhat similar to the one now before the court; but the change required to bring about this similarity converts the estate arising immediately on the death of the testatrix into one incapable of any application to charity during its continuance, and ties up the bequest for an indefinite time and for the same time postpones the arising of the contemplated charitable estate.

In the case of *Henshaw* vs. *Atkinson*, 3 Maddox, 306, the bequest was as follows:

" Whereas it is my wish and intention that a Blue Coat

School be erected at Oldham, and a Blind Asylum establishment at Manchester, under the management and direction of certain trustees to be hereafter appointed. I hereby give and bequeath 20,000*l.*, in trust, to the said trustees to each of the said charities, subject to such uses, limitations, and conditions as shall afterwards be determined for the government thereof, but, I direct that the said moneys shall not be applied in the purchase of lands or the erection of buildings, it being my expectation that other persons will at their expense purchase lands and buildings for those purposes."

In a codicil the testator appointed trustees to the two charities, provided for the temporary investment of the money, and directed his executors to pay over the interest of the said money annually, to the said trustees, of the said charities for the maintenance and support thereof.

This bequest was held good on the ground that it provided for the interest of the fund being "paid annually to the trustees of the said charities for the maintenance and support thereof." "The trustees have therefore a title to this annual payment from the death of the testator, and must apply it in the maintenance and support of the charities."

This was an immediate gift to the trustees appointed by the testator of the very charities he established by his own bequest.

Very great changes would have to be made in this case to assimilate it to the one now before the court. The funds would have to be given to trustees to hold, till by some act of Parliament a Blue Coat School should be incorporated at Oldham and a Blind Asylum at Manchester, with direction thereupon to vest the said incorporations with the moneys specified in the bequest.

"In the case of the *Attorney General* vs. *Craven*, 21 Beav., 392, lands were given by indendture "in trust out of the rents issues and profits thereof, to maintain, support and keep in good and tenantable repair, the houses and buildings in and upon the said field erected and being, and the walls and fences thereof, and the same, so supported, preserved and maintained, for the relief, support, comfort, use and convenience, of such of the poor inhabitants of certain parishes, (naming them,) as should thereafter, at any time happen to be visited with the plague as a pest house."

The heirs claimed a resulting trust in the lands thus deeded till the plague should reappear to give occasion for the application of the charity.

"If," says the M. R., in his opinion "no charitable trust is imposed on the property until the plague shall appear in this country, I am then of opinion that there is a resulting trust in favor of the donor and his heirs, and that they are entitled to the profits arising from the property until that event arises." * * * * * I think there are two distinct trusts specified in this deed; one of them is, to preserve the property in a state ready at any time to receive patients, and the other is to receive the persons, when the plague should arise. If that be the true construction it appears to me impossible to say that there was not always a present existing charitable trust."

But suppose this gift had been by devise to trustees to hold the estate till the plague should reappear and then to convey it to a pest house corporation to be created by Parliament we would have had a case somewhat assimilated to the one before the court; but this change would, till the reappearance of the plague, take from the gift the character of "*a present existing charitable trust.*"

Second. As the validity of those gifts was made to depend on each one of them being at all times a present existing trust, immediately available for the actual beneficiaries designated in the trusts, and as the case before the court is destitute of this very characteristic which validated those gifts, it follows that the intended gift to the Washington Hospital for Foundlings cannot be held valid under the law applicable to those English cases or to any of them.

II.

The second error assigned is that the court below held:

That in respect to gifts for charity there is to be no application of the rule as to perpetuites unless it appears on the face of the will itself, that under no circumstances was it the intention of the testator that his bequest should operate till after the expiration of the time prescribed by the rule. (v. opinion, line 123.)

This remarkable exposition of the law is made by the court below after having quoted, with approbation, from the opinion

delivered in the case of *Sinnet* vs. *Herbert*, L. R., 7 Ch., 240, the following paragraph:

"If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises. If it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuites, the gift fails *ab initio*." (V. opinion, line 70.)

Almost the next paragraph in the same opinion reads as follows:

"We agree with what was said by the Master of the rolls in *Cherry* vs. *Mott* that there may no doubt be a conditional legacy to a charity as well as for any other purpose, and we think that the question whether this is so or not, ought to be determined like all other questions of construction, by the application of the ordinary rules of interpretation to the language of each particular will." * * * * * * * * * *

"A contingent gift to trustees (although for a charity), having the effect of rendering the property inalienable during the whole continuance of the preceeding non-charitable estate, *must in order to be valid, necessarily* vest within the same limits of time as if the trustees had taken the residue (upon the same condition) for their own benefit, or for any other than charitable objects."

Executory devises for charitable purpose are therefore governed by the same law, as to perpetuities, as are executory devises for any other purpose. We have then but to inquire what the general rule of law is on that point.

Jarman says:

"It is an invariable principle in applying the rule under consideration, that regard is to be had to possible, not actual events, and the fact that the gift might have included objects too remote is fatal to its validity irrespectively of the event." 1 Jar., 233.

Redfield says:

"The question of remoteness is to be determined with regard to possible events and not to those that actually occur. If, therefore, the limitation is to such persons or upon such events that it may extend beyond the allowed limit, the devise will be void for remoteness, notwithstanding the fact that

it may or does occur within the limits allowed by law." 2 Redfield, 571, sec. 14.

In treating of this subject, Williams says:

"When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void, both at law and in equity. And even if in its actual event, it should fall greatly within such limit, yet it is still as absolutely void as if the event had occurred, which would have taken it beyond the boundary." Williams on Real Property, 294.

In another place the same author says:

"Every executory estate which might in any event transgress this limit will from its commencement be absolutely void." Williams on Real Property, p. 294.

To the same effect, Cruise says:

"Nor is it material, in such cases, how the fact actually turns out; for the possibility, at the creation of such executory limitation, that the event on which its existence depends may exceed in point of time the limits allowed, vitiates it *ab initio*." Greenleaf's Cruise on Real Property, tit. 38, c. 17, sec. 23.

Leaving the elementary writers and looking into the decisions of the courts, it will be found that the rule has been applied wherever applicable, without a single exception.

In the case of *Everitt* vs. *Everitt*, 29th Barber, 118, the following language is used:

"The limitation must be such that it must take effect within the prescribed period or it is void. When an executory devise is limited, as an event which may not happen within the period above mentioned, as upon a general failure of heirs or issue, it is void; nor is it material in such case how the fact actually turns out, for the possibility at the erection of such executory limitation, that the event upon which its existence depends may exceed in point of time the limits allowed by law, vitiates it *ab initio*."

In the case of *Stephens et al.* vs. *Evans, Adm'x*, 30th Ind., 51, the court says:

"The rule is that a limitation over by way of executory devise in order to be valid must be so made that the estate not only may, but must vest in possession within a life or lives in being and twenty-one years and nine months at the farthest,

and if by any possibility the vesting may be postponed beyond this period the limitation will be void; and the period from which the rule runs is the death of the testator."

"The facts in the case at bar are within the rule. The limitation to the cousins would have taken effect in possession, if at all, by the events which have happened within the prescribed period, yet a state of facts might have existed in which it would not have taken effect."

"The time, for aught that appears, at the death of the testator, might have been extended by the birth of a child twenty years afterwards, who within five years should take the whole of the interest limited in the fourth article as sole survivor of the father, mother, brother and sister, and held it for seventy-five years and then die without heirs of his body, in which case by the express terms of his will the cousins would take under the limitation under consideration seventy-five years after the expiration of lives in being."

In the case of *Sears* vs. *Russell*, 8th Gray, 98, we find the following:

"It is true that as events have transpired since the death of the testator, to wit, by the death of his daughter, leaving a husband and children alive,—the devise to the heirs would vest, if at all before the expiration of the period. But the point of time at which the will is to be construed is at the testator's death. It is then that the language speaks. A devise must be then legal or it must fail. It is not sufficient that on the happening of certain events the gift over may take effect, and if originally limited to those events would have been valid, but it must appear to be legal and valid in all the events which at the time the will takes effect may by possibility occur. A limitation by way of executory devise must *ex necessitate* take effect within the prescribed period. If the event upon which the estate is limited may by possibility not occur within that time, it is too remote.

In *Phelps* vs. *Pond*, 23rd N. Y., 69, the bequest was of $50,000 to executors, for the purpose of building a college in Liberia, if $100,000 should be raised for that purpose in this country.

Held too remote and void: referred to in 4 Kent, 272, n.

In the case of *Rose* vs. *Rose*, decided in 1863, in the N. Y. Court of Appeals, the testator gave $100,000 to executors, to

aid in founding a benevolent association, if within five years from his decease $300,000 should be raised from other sources.

Held void as a perpetuity. 4 Kent, 272, n.

These two cases, as well as the case of *Sinnett* vs. *Herbert*, *supra*, determine that gifts to charities are not exempt from the rule against perpetuities, and the same point was held by Sir Edward Sugden, sitting in the Irish Court of Chancery. 1 Drury and Warren, 245.

In *Barnes* vs *Barnes*, 3 Cranch, C. C., 269, a devise is made through executors, to the corporation of Georgetown, for building a poor house, on the contingency that such provisions shall be taken as will, in the opinion of his executors, render reasonably certain the completion of the enterprise. Held, if an executed devise, void; if an executory devise, it is void because it is not necessarily to be executed within a life in being at the testator's death, or twenty-one years thereafter.

In the case of *Brattle Square Church* vs *Grant*, 3rd Gray, commencing with the last paragraph on page 151, and ending with the first paragraph on page 156, the matter is treated exhaustively, and among the authorities cited are the following, to wit:

4 Kent, 267. 1 Jarman on wills, 221. 4 Cruise Dig., title 32, c. 24, sec. 18. *Nightingale* vs. *Burrell*, 15 Pickering, 111. *Cadell* vs. *Palmer*, 1 Clark and Finley, 372. 2 Atkinson on Conveyancing, (2 ed.) 264. *Bacon* vs. *Proctor*, 1 Turner and Russell, 31. *Mackworth* vs. *Hinxman*, 2 Keen, 659. *Ker* vs. *Lord Dungannon*, 1 Drury and Warren, 509. *Commissioners of Charitable Donations* vs. *Baroness De Clifford*, 1 Drury and Warren, 245 to 253. Lewis on Perpetuities, 169. *Duke of Norfolk* vs. *Howard*, 1 Vern., 163. *Welsh* vs. *Foster*, 12 *Mass.*, 97.

The limit of time beyond which an executory devise cannot arise, counting from the death of the testator, is a life or lives in existence, and twenty-one years and nine months. But in case no lives are mentioned by the testator, then the time is fixed at twenty-one years.

In support of this point, we refer to Williams, as follows:

"With regard to future estates, of a destructible kind, namely, contingent, remainders, we have seen that a limit to their creation is contained in the maxim, that no remainder can be given to the unborn child of a living person for his life, followed by a remainder to any of the issue of such unborn person the latter of such remainders being absolutely void. This maxim, it is evident, in effect forbids the tying up of lands for a longer period than can elapse until the unborn child of some living person shall come of age: that is, for the life of a party now in being, and for twenty-one years after, with a further period of a few months during gestation, supposing the child should be of posthumous birth. In analogy, therefore, to the restriction thus imposed on the creation of contingent remainders, the law has fixed the following limit to the creation of executory interests; it will allow any executory estate to commence within the period of any fixed number of now existing lives, and an additional term of twenty-one years; allowing further for the period of gestation, should gestation actually exist. This additional term of twenty-one years may be independent or not of the minority of any person to be entitled; and if no lives are fixed on, then the term of twenty-one years only is allowed. But every executory estate which might, in any event, transgress this limit, will from its commencement be absolutely void." Williams on real Estate, 301.

Jarman says:

"Where the vesting of a gift to unborn persons is postponed for a fixed term exceeding twenty-one years, the gift is unquestionably void, although not preceded by a life; for the fact of a testator not having availed himself of the allowance of a life does not enable him to take a larger number of years." 1 Jarman on Wills, 230.

We thus find that the devise in question is void, if, at the death of the testator, a possibility existed that it might not vest in the prescribed corporation within twenty-one years, or at farthest, a life or lives in being, and twenty-one years.

Was there at that time such a possibility?

The devise is to trustees to convey a fee on an approval, which the said trustees, their survivor, or his successors *might possibly make* of a corporation which Congress *might possibly create*.

It is equivalent to a devise of real estate to A, in trust, the

fee subsequently to vest in such child subsequently to be born of C, as A or A's successors might designate, in trust for such foundlings as such child of C, so selected might designate as the beneficiaries of the trust.

There is no limit to the time within which the corporation must be created by Congress.

There is no limit to the time within which the corporation shall be approved after its creation by Congress, if ever created.

And finally, there is no limit to the time within which the possibly approved possible corporation shall make provisions, so that any foundling could by possibility receive any of the benefits of the trust.

The time that might intervene between the death of the devisor and the creation of such a corporation by act of Congress, as specified in the will, might be a day, a thousand years, or possibly Congress might never create such a corporation. This is one possibility.

The time that might intervene between the creation of such a corporation and the approval of it by the trustees, might be a day, a thousand years, or possibly the trustees might never approve it. This is a second possibility.

The time that might intervene between the approval of such corporation by the trustees, their survivor, or some one of his successors, and the rendering of the trust available to foundlings might be a day, a thousand years, or it might never be made available. This is the third possibility.

And in adaptation to these several possibilities, the devisor left the approval of the corporation to be made by the original trustees, by their survivor, by the immediate successor of that survivor, or by the fiftieth, as circumstances might require.

## III

The third error assigned is that the court below held:

That the devise is void neither on the ground of perpetuity nor for the uncertainty of its object. (V. opinion, line 205.)

We are now to consider whether the trust in question is void by reason of the uncertainty of the beneficiaries.

Has the testator in his will so pointed out any beneficiaries of the trust that the courts could compel it to be administered for their benefit, were it not a charity?

The only language in the devise that even tends to point out beneficiaries of the trust, is the following:

"In trust to hold the said fourteen lots of ground with the appurtenances as, and for a site for the erection of a Hospital for Foundlings, to be built and erected by any association, society or institution that may hereafter be incorporated by act of Congress, as and for such hospital." (Ante, line 28.)

The term "foundlings" is used in its broadest sense, without there being in the will the slighest intimation of an intention to limit it either as to locality, race or color, previous or present condition, native or foreign, nor has the testator vested in any party discretion to select the beneficiaries. If the courts could compel the trust to be administered for the benefit of any one foundling, it could for all others whom accident or the cruelty of any of the five races of men may have made foundlings.

In the case of the *Baptist Association* vs. *Hart's executors*, 7 Wheaton, 1, the will limits the use of the fund for the "education of youths of the Baptist denomination who shall appear promising for the ministry, always giving a preference to the descendants of my father's family."

Referring to this description of the beneficiaries of Hart's trust, Chief Justice Marshall, in delivering the opinion of the Court, asks: "Are there any, who, upon the general principles of equity, can entitle themselves to its benefits?" He answers the question in the negative, saying it will not admit of discussion.

It cannot be the testator Peirce intended the benefits of this trust to be distributed among all the foundlings that may be on the earth, but as he has not himself selected any class nor authorized any other party to make the selection, no selection can be made, and consequently no one of them could on the general principles of equity maintain a claim to any of the benefits of the trust.

The law of this District is that no devise which cannot be maintained on general principles of equity can be maintained by reason of its being a charity.

In the case of *Coltman et al.* vs. *Moore et al.* 1 McArthur 197 real and personal estate in the District of Columbia was devised and bequeathed to trustees to hold for the testators children for twenty years and in the event of none of said children and no issue or legal descendant of any of them being alive at the expiration of the said term of twenty years all the testators real and personal estate is devised to the mayor, board of aldermen, and common council of the city of Washington, to establish and endow a house of refuge for destitute and reputable females." (V. 1, McArthur 198.)

The testator in the one case was a resident of the District of Columbia, and so was the testator in other case. The corpus of the one gift was in the District of Columbia, so was the corpus of the other gift. The gift in the one case was to be made available in the District of Columbia, and so was the other. The one was "to establish and endow a house of refuge for destitute reputable females" the other is "for a site for the erection of a hospital for foundlings." The one case was decided by the Supreme Court of the District of Columbia, in the year 1873. The other was decided by the same court, without any change having taken place in its personnel, in the year 1874. The one is reported in 1 McArthur, 197, the other is reported in 1 McArthur, 541. In the former case the court say:

"It may well be questioned whether the devise now under consideration would be good as a charitable gift within the meaning of 43 Eliz., even if it were made to an individual. It has, however, been adjudicated in the state just mentioned," (Maryland), "that this statute has never been in force there and consequently has never been in force in the District of Columbia. *Dashiell* vs. *Attorney General*, 5 H. and J., 392; *Same* vs. *Same*, 6 H. and J., 1; *Wilderman* vs. *City of Baltimore*, 8 Maryland, 551. And the same authorities conclusively show that a devise like the one in this case is too vague and indefinite to be enforced; and it cannot be supported as a charitable devise by any aid to be derived from the statute last referred to. A practice is however recognized in chancery to construe charitable gifts and to administer them upon principles analogous to its provisions. *Whitman* vs. *Lex*, 17 Serg.

and Rawle, 88. And this doctrine has been sanctioned and acted upon by the Supreme Court of the United States. *Vidal* vs. *Girard, Supra; Perin et al.* vs. *Carey et al.*, 24 How., 465. But it must be conceded in this case that it can derive no aid from this conservative rule, for here the trust is too vague and uncertain to be carried into effect whether chancery has jurisdiction under the statute, or upon some principle of practice analogous to that contained in its provisions. It is not competent to compel either individuals or corporations to execute a trust of this character, which is not sufficiently defined in the instrument creating it. The testator makes the devise to the city to establish and endow a house of refuge for destitute reputable females. This is too vague, no means are suggested by which they can by possibility be ascertained. The locality is not stated from which the objects of this bounty are to be selected, whether from the city or District, or from a particular state, or from all the states, or from the world at large."

A long and unbroken series of decisions in Maryland are to the same effect.

This question arose first in that state in the case of *Lingan* vs. *Carroll*, 3 Harris and McHenry, 333, decided in 1793. It was a devise unto the trustees of a College, academy and charitable school of Philadelphia in trust, &c. The devise seems to have been treated by all parties to the suit as void, the only contest being as to whether the residuary devisee or heir should take.

The next is the case of *Dashiell et al.* vs. *Attorney General*, 5th Harris and Johnson, 898. In this case the Court said:

"It is an admitted general principle, that a vague bequest, the object of which is indefinite, cannot be established in a court of equity."

"Is this a bequest of that description? We think it clearly is. The testator, by his will, appointed the appellants, George Dashiell, and Henry Downs, trustees of his estate, and guardians of his only child, with instructions to his executor to pay over to them the annual income of his estate, to be by them appropriated according to the provisions of the will, which, after providing among other things for the payment of debts, and the support and education of his daughter, directs the residue of the income of his estate 'to be equally divided, one-half to be applied towards feeding, clothing and educating the poor children belonging to the congregation of Saint Peter's Protestant Church, in the city of Baltimore,' etc., with certain

provisions for the eventual increase or decrease of the fund so set apart for that purpose."

"Wherever the word poor or poorest has been used as a term of description in a devise or bequest, it has been held to be insufficient, for uncertainty; as a devise to twenty of the poorest of the testator's kindred. Powel on Devises, 419; 3 Com. Dig. 412, with many other authorities, to which it is unnecessary to refer. In this case the bequest is quite as vague and indefinite as if it was to twenty of the testator's poorest relations, or to his poor relations generally, as the poor people of a particular county."

"Who are the poor children belonging to the congregation of Saint Peter's Protestant Episcopal Church in the city of Baltimore?"

"No court can know, or have the means of ascertaining; and the description of the cestui que trust is so vague that none can be found who, upon the general principles of equity, can entitle themselves to the benefit of the trust."

"It seems to be supposed that the power of ascertaining and designating the 'poor children belonging to the congregation of Saint Peter's Church' is given by the will to the trustees, and that the beneficial interest of the cestui que trust may be sustained by reason of the intervention of trustees capable of taking the legal estate, on the principle that *id certum est quod certum reddi potest.*"

"If it be admitted that authority is vested by the will in the trustees to ascertain and designate who are the poor belonging to the congregation of Saint Peter's Church, it cannot, abstracted from the statute, assist the case of the defendants, for being a personal trust, without the aid of the statute, the cestui que trust can only be brought into being by the ascertainment and designation; though certain relations have been made, no persons exist having in themselves a vested equitable interest which they are capable of ascertaining in a court of rights. It would be to make and not expound and enforce wills; an arbitrary exertion of judicial power altogether inconsistent with any principle known to the institutions of the State."

The next case is that of *Dashiell* vs. *The Attorney General, ex re. the Trustees of Hillsborough School*, 6 Harris and Johnson 1. The will directed the trustees and guardian of his child to pay over annually to the trustees of Hillsborough school to be by them applied towards feeding and educating the poor children of Caroline County, in the State of Maryland, which attend the

poor or charity school, established at Hillsborough, in said county. Held void on the principles laid down in the case of *Dashiell et al.* vs. *The Attorney General*, 5 H. and J. 398.

The doctrine of these cases has been reaffirmed in the case of *Wilderman* vs. *Baltimore*, 8 Md., 551, in which it was held in regard to a bequest for the relief and support of the indigent and necessitous poor persons who may from time to time reside within the precincts of a certain ward in the city of Baltimore, that there is no jurisdiction in Chancery to set up a charity so vague that cestui que trusts can only be designated by the arbitrary discretion of the trustees.

An important case in point is that of the *Board of Missions of the Presbyterian Church* vs. *White's administrators*, tried in the Circuit Court of the United States, for Maryland. 4 American Law Register, 531.

*Syllabus*:

A bequest in a will, "*I leave the whole of said fund in the hands of my executor, to the support of Missionaries in India as it is my desire to aid, etc., the same, to be by him applied under the direction of the General Assembly's Board of Missions of the Presbyterian Church in the United States*," is void for uncertainty.

EXTRACT FROM OPINION OF GILES, J.

"However much I may regret that the pious intentions of the testatrix will be defeated, yet, sitting here to decide this question in accordance with the law of this State, I cannot do otherwise than pronounce the bequest void for uncertainty. The money is to be retained by the executor, to be by him applied to the support of the Missionaries in India, under the direction of the General Assembly's Board of Missions, etc. The executor is the trustee, and the Missionaries are the cestui que trusts; and the Board of Missions is merely the agent to direct the manner in which the money shall be applied to the beneficiaries of the trust. Now, who can enforce the execution of this trust in a Court of Chancery? What missionaries are meant? Are the missionaries in India of every denomination, or only those of the Presbyterian Church? And if the latter, those in India to-day, or only those who were there when the testatrix died?"

"For I take it to be the rule of law, in reference to all such bequests, that the beneficiaries of a trust must be certain and definite; so clearly ascertained that they have a standing in a

Court of Equity to enforce the trust. If such be the case, the bequest is good, although there may be no trustees appointed by the will to carry out the trust, or in whom the legal estate can vest. But whether there be a competent trustee or not, if the cestui que trusts are not clearly ascertained by the will, the devise or bequest is void.

"Such is the unbroken current of decisions in this and all other States, which have not adopted the Statute of charitable uses of the 43d of Elizabeth.

"I need only refer, in support of this, to the following cases: "*Dashiell* vs. *The Attorney General*, 5 H. & J., 398; *same parties*, 6 H. & J., 7; *Baptist Association* vs. *Hart's Executors*, 4 *Wheaton*, 1; *Wheeler* vs. *Smith and others*, 9 Howard, (S. C.,) 76; and to the case of *Meade and others* vs. *Beale and Latimer*, decided in this court by my brother, the Chief Justice, Campbell, 359."

"In that case, a bill was filed in this court by the complainants, who represented 'The Education Society of Virginia,' to enforce a bequest to the 'Education Society of Virginia,' for the benefit of the 'Theological students at the Protestant Episcopal Theological Seminary, near Alexandria in the District of Columbia.'

"The Chief Justice decided that the bequest in that case was void by the laws of this State, and even if the Education Society had been incorporated and competent to become a legal trustee, the description of the cestui que trusts was so vague and indefinite, that it would be impossible for the court to enforce or supervise the execution of the trust. This view of the law relieves me from the necessity of considering the argument of the complainants' solicitor, in reference to the right and capacity of the 'Trustees of the General Assembly of the Presbyterian Church of the United States of America,' to receive and take all bequests made to 'the General Assembly's Board of Missions, a body not now in existence; or to the right of the original complainants to enforce a bequest made to 'the General Assembly's Board of Missions.'

"Being of the opinion, therefore, that this bequest in Miss White's will is void, for the reasons I have given, I sign a decree dismissing the bill filed in this cause, with costs."

These decisions, all uniform, extending through eighty-four years, determine what the law of Maryland and the District of Columbia is, if the courts and time can determine anything; and although a totally different construction of the common

law applicable to this case may prevail in every other State, we cannot, under the decisions of this court, go to the courts of other states for interpretation of the law of real estate upon a point which for generations has been fixed and established in the Maryland courts and in those of the District of Columbia, till the decision made in this solitary case.

It is a maxim in this court in cases involving the law of real estate, always to follow the decisions of the courts of the state in which the cases arise, whenever those decisions for a long series of years have been uniform. *Polk's lessee* vs. *Wendal et al.*, 9 Cranch, 87; *Shipp et al* vs. *Miller's Heirs*, 2 Wheat., 316; *Thatcher et al* vs. *Powell et al*, 6 Whea., 119; *Gardiner* vs. *Collins et al*. 2 Pet., 57; *Jackson* vs. *Chew*. 12 Wh., 153; *Blight's Lessee et al*. vs. *Rochester*. 7 Wheat., 535; *Daly* vs. *James*, 8 Wheat., 495; *Suydam* vs. *Williamson*, 24 H., 427; *Beauregard* vs. *City of New Orleans et al*., 18 H, 497. These authorities show that a devise for charity cannot be maintained in the District of Columbia unless the beneficiaries are pointed out with certainty by the will, and consequently that the court below erred in not holding the present devise void for uncertainty as to the beneficiaries under the trust.

IV.

The fourth error assigned is that the court below held:

That in no event was there to be a resulting trust to the heirs.

The true rule of law is found in Jarman.

"As a testator can only devise the real estate to which he was actually entitled at the time of making his will, it follows that every residuary devise in such a will, however general in its terms, is in its nature specific; being in fact, a specific disposition of the lands not before given, or, to speak more accurately, not before *expressed to be given* by the will. Thus, if a testator being seized of Blackacre and Whiteacre, and having no other real estate, devise Blackacre to A, in fee, and all the rest of the land to B, B takes exactly that which he would have taken under a specific devise of Whiteacre, and no more, and consequently if the devise to A fail, from its being devoted to charity, or from the devisee being dead at the time, or from his subsequent death in the testator's lifetime, B can no more take, by virtue of his residuary devise, the interest so given, or in-

tended to be given, to A, than he could have done under a specific devise of another property." 1 Jar., 588.

"A residuary devise is a specific disposition of whatever the will does not purport to dispose of as exemplified in the case of lapsed devises, between which and the case of a void devise there seems to be no substantial distinction; for the testator conceives himself to have disposed of the property comprised in the void devise, and therefore does not intend the residuary devise to extend to it." Do. 590.

"If, after carving out a partial or contingent interest, the testator limit the reversion in fee, or the alternative fee to his own heirs, such devise, though inoperative in law to break the descent, is considered to indicate an intention to exclude this property from the residuary clause, and accordingly such reversion devolves on the heir." Do. 593.

The following cases show how the rule has been applied in England:

*Grosvenor* vs. *Hallam*, Ambler 643. Devise of land subject to payment of £10 per annum, which was void *ab initio*. *Held* that it went to the heir, and not to the residuary devisee.

*Jones* vs. *Mitchell*, 1 Simmons and Stuart, 290. Devise of real estate in trust to be sold, and out of the proceeds to pay certain legacies, and a legacy of £800 to charities, which latter was void, and the residue to R. *Held* that the void legacy of £800 belonged to the heir.

*Collins* vs. *Wakeman*, 2 Ves. Jun., 686. Devises certain lands to W, in trust to sell; the proceeds to be personal estate. Gave out of the proceeds certain legacies, and £1,000 to be disposed of by after instructions, which were never given. Then gave all the residue, real and personal, to M. *Held* that the £1,000 belonged to the heir-at-law.

*Arnold* vs. *Chapman*, 1 Vesey's Cas., 108. Devise of copyhold to Chapman, he to pay executors £1,000; then devises residue (including the £1,000) to the Foundling Hospital, which devise of the £1,000 was void. *Held* to be a part of the real estate undisposed of, belonging to the heir.

*Tregonwell* vs. *Sydenham*, 3 Dow. 194. The devisee takes only what was intended to be given to him. The heir takes

what is undisposed of, whether it is given to him or not, as he takes not by force of the intent, but by the rule of law.

The same rule has been followed in Maryland:

*Lingan* vs. *Carroll*, 3 Harris and McHenry, 333, Devises part of his real estate for charities, in Philadelphia, which were void, and then gives the residue to others. *Held* that the void devise goes to the heirs and not to the residuary devisees.

It was also followed in this District in the case of *Barnes* vs. *Barnes*, 3 Cranch, C. C. 269. In this case the residue was devised to trustees for specific purposes. Some of these specific devises being void they were held to vest in the heirs-at-law. 950

This question was fully investigated and all the authorities pro and con collated in the case of *Van Kleeck* vs. *Dutch Church of New York*, 20 Wendall, 457, and the opinion is conclusive in support of the rule as laid down above as between the heir and the residuary devisee.

But the court below by a misconstruction of the will concluded that if Congress should fail to create a corporation for the purpose, or one acceptable to the trustees or if the grant to the future corporation should be void on the ground that no time was specified within which it was to take effect, the only consequence would be that the trustees themselves would hold the property for the same purpose and might proceed to erect the hospital." (V. opinion line 224.) The court fell into this error through a mistake in the application of the word "same" in line 41, *supra*. It is found in a clause of the will providing for the contingency in case the trustees should not approve the first corporation which Congress might create to build the hospital. The trustees were first charged with the holding of the lots for the purpose of conveying them to a future corporation which they might approve. In case a corporation should be created which they could not approve they were directed to continue holding them for a future corporation which they might approve. But the court below thought the trustees were to hold the lots for the identical purpose for which the corporation was to hold them, that is, for the purpose of erecting a hospital on them. But the conveyance was to be made for the purpose of 960 970

having the corporation build the hospital. If the testator had, by the terms of his will, actually provided that the trustees should erect the hospital and then make the conveyance to the corporation to erect the hospital there would be good ground for holding the entire will void for a mental defect in the testator.

V.

The fifth error assigned is that the court below held:

That the devise was made in favor of a corporation which should be created by Congress within the period permitted by the law for the vesting of an executory devise in the ordinary case of an individual.

The court below arrived at this conclusion from the fact "that the taxes, charges and assessments which might be levied upon the property previous to the making of the conveyance to the future corporation should all be paid by his executors out of the residue of the estate." (V. opinion, line 232.) The reasoning of the court is as follows:

It was not in the testator's power effectually to encumber the residue of his estate beyond the life time of his executors therefore Congress could not postpone the creation of the future corporation beyond that time, and the trustees could not postpone their approval of it for a longer period. This is the first judicial enunciation of the doctrine that Congress must of a necessity do a particular thing within a particular time because otherwise an item of a citizens will would be a nullity. It is also the first enunciation of the doctrine that a devisor could not encumber his estate beyond the life time of his executors.

Every premise being false of course the conclusion drawn from them by the court must be absurd.

But again, so palpable is it that the devise is not an *immediate* gift to charity, that in the last paragraphs of the opinion it is considered an executory devise. But how it can be an immediate gift to charity and at the same time be an executory devise is not made clear by the opinion of the court.

VI.

The sixth error assigned is that the court below held:
That the devise in question is valid.

This is simply the condensed aggregate of all the other errors assigned and needs no separate discussion.

O. D. BARRETT,
BENJ. F. BUTLER,
*Counsel for Plaintiff in Error.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1876.

ELIZABETH C. OULD, ET AL.,
PLAINTIFFS IN ERROR,
*vs.*
WASHINGTON HOSPITAL FOR FOUNDLINGS,
DEFENDANT IN ERROR.

No. 301.

It is this 19th day of February, 1877, stipulated by and between the counsel for the plaintiffs, and defendant in error respectively, in the above entitled cause that all exception to the record now filed by reason of its not containing a copy of the opinion of the Supreme Court of the District of Columbia giving the reasons for the judgment entered by said court in said cause shall be, and hereby, are waived, conditioned on a printed copy of said opinion being attached to the brief of the plaintiffs in error.

W. S. COX,
*Counsel for Def't. in Error.*
O. D. BARRETT,
*Counsel for Plaintiffs in Error.*

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*Opinion referred to in the above stipulation.*

Mr. Justice Wylie delivered the opinion of the court.

This is an action of ejectment, brought by the plaintiffs, as heirs at law of Joshua Peirce, deceased, to recover certain lots of land in the city of Washington, now in the possession of the defendant, and claimed by it under the will of Mr. Peirce, and certified hither from the circuit court to be heard in the first instance.

The testator died on the 11th of April, 1869, having made his will, the 14th section of which is in the following terms:

(See statement in record for same, p. 4, last ¶.)

The heirs of the testator claim that the devise of these fourteen lots is void, because—first, it attempts to create a perpetuity, and, second, that the objects of the devise are uncertain.

At the date of the testator's death the Washington Hospital for Foundlings was not in existence, but has been incorporated since that event, by act of Congress, and received a deed for the property in controversy from the trustees named in the devise. But it is claimed by the plaintiffs that, no time having been limited by the will within which the act of incorporation should be passed by Congress, there was a possibility that Congress might never pass the required act, or if it should do so, the passage of the law might be deferred to so remote a future as to be beyond the limit of any life or lives in being and twenty-one years afterward. But the rule in regard to perpetuities, we think, has no application where the immediate gift is a trust for charitable purposes, although the time for its application may be indefinite.

In *Sinnett* vs. *Herbert*, L. R., 7 ch., 240, the lord chancellor said: "As to the difficulty from the possible remoteness of the time when her intention can be carried into effect, I think the case of the *Attorney General vs. Bishop of Chester*, 1 Bro., ch., 444, is a complete answer. There was a sum of £1,000 left for a good charitable purpose, namely, for the purpose of establishing a bishop in the King's dominions in America. There was no bishop in America. The sum being only £1,000, was not very likely, in itself, to be sufficient to establish a bishop. Nothing could be more remote or less likely to happen within a reasonable period, than the appropriation of that fund to that particular object. But that Court did not direct any appropriation of the fund according to the *cy pres* doctrine. It would not allow the fund to be dealt with immediately, but directed the fund to remain in hand for a time, with liberty to apply, because it was not known whether any bishop would be established."

A case in its principal features much like the present was

that of *Chamberlain vs. Brockett*, L. R., 8 ch., 206. The testatrix, after stating that she did not confidently feel that her family would not spend her money on the vanities of the world, &c., gave personal estate to trustees, to make certain annual payments for charitable purpose, and then directed that, when and so soon as land should be given by any other person for that purpose, two alms houses should be built, and the surplus appropriated in making allowances to the inmates; and the gift was held to be valid, as it was an immediate gift for charitable purposes, although the time of its application was indefinite.

In this case the rule was laid down by the lord chancellor in the following language: "If there was an immediate gift of the whole residue for charitable uses, the authorities mentioned during the argument—*Attorney General* vs. *Bishop of Chester*, 1 Bro., Ch., 444; *Henshaw* vs. *Atkinson*, 3 Madd., 306, and *Sinnet* vs. *Herbert*, L. R., 7 ch., 232, to which may be added *Attorney General* vs. *Craven*, 21 Beav., 392, prove that such gift was valid, and that there was no resulting trust for the next kin of the testatrix, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all *except on the occurrence of events in their nature contingent and uncertain*. On the other hand, if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled the estate never arises. If it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*."

The doctrine declared by these authorities is this, as we understand it, that where there is a gift for charity it will be carried into effect by the courts unless upon its face, and certainly, it is opposed to some rule of law. If the gift be upon condition precedent and that condition have not taken place, the bequest is void. If it plainly and in terms is in violation of the rule against perpetuities, it is also void. But if at the testator's death, there only be a possibility of the happening of

a contingency by which the gift may be postponed beyond the period prescribed in the rule against perpetuities, but that contingency in fact has not happened, and from events which have already taken place cannot happen, the gift will be supported. Indeed one branch of the rule against perpetuities has never had application to bequests in trust for charitable objects. Blackstone says, "by perpetuities (or the settlement of an interest which shall go in the succession prescribed, without any power of alienation,) estates are made incapable of answering those ends of social commerce, and providing for the sudden contingencies of private life, for which property was at first established." Book 2, p. 173. And yet, for purposes of charity, trusts may be created which may forever retire the given property from the power of alienation and the uses of commerce. That was the case with Girard's will, 2 How., 127, and with McMicken's will, 24 How., 465. In this last case the devise was to the city of Cincinnati, in trust forever for the purpose of building, establishing, and maintaining, as far as practicable, two colleges for the education of boys and girls. None of the property devised or which the city might at any time purchase for the benefit of the colleges could at any time be sold. Such a trust in other cases would have been in violation of the rule against perpetuities, but as to the charity it was valid. In 2 Story's Eq., sec. 1167, the author says: "Again, although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy; yet where the legacy is to a charity, the court will consider charity as the substance, and in such case, and in such cases only, if the mode pointed out fail, it will provide another mode by which the charity may take effect, but by which no other than charitable legacies can take. A still stronger case is that if the testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain or to some future act the mode by which it is to be carried into effect, there the court of chancery, if no mode is pointed out, will, of itself, supply the defect and enforce the charity.

In respect to gifts for charity, therefore, there is no place in a court of equity for the application of the rule as to perpetui-

ties unless it appear on the face of the will itself, that under no circumstances was it the intention of the testator that his bequest should operate till after the expiration of the time prescribed by the rule.

But it may be said that these doctrines are those only of the English chancery; that they depend upon the statute of the 43rd Eliz., which has never been in force in this District, or in the State of Maryland, of which this District was at one time a part.

It is quite true that the doctrine of *cy pres*, which was greatly enlarged and developed in England under that statute, has never been followed here, except to the extent of carrying into effect the intent of the testator. That doctrine, however, so far as it depends upon the statute of Elizabeth alone, is confined to cases in which no trust is interposed, or where there is no person *in esse* capable of taking, or where the charity is of an indefinite nature. In such cases, the doctrine is the offspring of the statute of Elizabeth, and is not a doctrine to be applied in our courts. But where there is a trust, and the charity is defined, there is no need for any aid from the statute of Elizabeth; for the jurisdiction of the court vests on ancient and well settled grounds independently of the statute. (See 2 Story Eq., section 1162.)

There probably never would have been any difficulty in the courts of this country in regard to questions of this character, but for the decision of the Supreme Court of the United States in the case of the *Baptist Association* vs. *Hart's Executors*, 4 Wheat., 1. The correctness of that decision very soon began to be doubted. It was commented upon without approval, though not with any distinct dissent, by the same court in the case of *Inglis* vs. *Trustees of Sailors' Snug Harbor*, 3 Peters, 113. In this case the bequest was sustained, though to an unincorporated society, and for purposes of a general character. In *Porter* vs. *Chapin*, 6 Paige's Ch., 649, Ch. Walworth says: "Although some doubt was thrown upon the question of charitable donations for the benefit of a community or body not incorporated, so as to be capable of taking and conveying the legal title to the property in that case, I believe it is generally admitted that the decision was wrong. This opinion of Chan-

cellor Walworth is quoted with approbation by the Supreme Court of Massachusetts, in *Bartlett* vs. *Nye*, 4 Met. 879. The decision was evidently contrary also to the opinion of Chancellor Kent, as may be seen in the second volume of his commentaries, 285. Since then, the doctrines of that case have been distinctly called in question by the Supreme Court of the United States, in *Vidal* vs. *Girard's Executors*, 2 How. 127, and in *Perin* vs. *Carey*, 24 How., 465, and the conclusion reached that charitable uses may be enforced in chancery under its general jurisdiction, independently of the statute of Elizabeth. The first of these two cases was from Pennsylvania, and the other from Ohio. In neither of these States was the statute of Elizabeth in force, although in both its principles are substantially administered as derived from the common law.

We have been referred to the case of *Dashiell* vs. *The Attorney General*, 5 H. & J., 398, as authority showing that the statute of Elizabeth was never in force in Maryland, and consequently not in this District. That proposition may be admitted, and yet leave the jurisdiction of this court over the subject of charitable uses as complete and ample as that reported by the Supreme Court in the cases already referred to. The decision in that case was doubtless correct. It could not have been otherwise except under the *cy pres* jurisdiction, which no one pretends to exist in this court, except so far as allowed by the common law. The trust in that case was, that the trustees should appropriate the fund to the feeding, clothing, and educating the poor children belonging to a named congregation, *not such as the trustees might themselves select*, and without any power or right given the trustees to discriminate in the objects of the charity. It is distinctly suggested by the court that the decision would have been different had that right and power been vested in the trustees, for then the subjects of the bounty would have been ascertained and certain.

It is the only case on the subject which we have found in the Maryland reports, and having been decided since this District became independent of that State, and in regard to a question as to the general jurisdiction of chancery, and not upon the construction of a local statute, is entitled to no greater respect in this District than the decision of that court upon any

other subject; that is, it is entitled to respectful consideration but is not obligatory.

We conclude therefore that the devise in question in the present case is void neither on the ground of perpetuity, nor for the uncertainty of its object.

But another aspect of the case is presented on the construction to be given to the language of the devise. The trustees are in the first place to hold the property as and for a site for the erection of a hospital for foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by an act of Congress as and for such hospital, and upon such incorporation upon further trust to grant and convey the said lots of ground and trust-estate to the corporation or institution so incorporated, &c. But there is a proviso to this devise which it is important to examine. The testator foresaw that the society so incorporated might not be acceptable to the trustees. In that event he declares his wish to be that the trustees should themselves hold the property for the same purpose, that is, as a site for a foundling hospital, until a corporation was created by Congress which should meet their approval; and he gives the trustees absolute discretion on this subject. If therefore, Congress should fail to create a corporation for the purpose, or one acceptable to the trustees, or if the grant to the future corporation should be void on the ground that no time was specified within which it was to take effect, the only consequence would be that the trustees themselves would hold the property for the same purpose, and might proceed to erect the hospital. In no event was there to be a resulting trust for the heirs.

The proviso contains this further direction, that the taxes, charges, and assessments which might be levied upon the property, previous to the making of the conveyance to the future corporation, should all be paid by his executors out of the residue of the estate. The corporation contemplated was, therefore, to be created during the life time of those executors, and before the final settlement of the estate. It was not in the testator's power to incumber the residue of his estate with these charges beyond the period prescribed by the rule of perpetui-

ties. The conveyance was to be made therefore within that limit and it could be made only after the corporation was created

Hence, it is seen from an exact interpretation of this devise, that it was made in favor of a corporation which should be created by Congress within the period permitted by the law for the vesting of an executory devise in the ordinary case of an individual.

We are of opinion, therefore, that the devise in question is valid, and that judgment be for the defendant under the stipulation filed in the case.

15 January

# In the Supreme Court of U. S.

ELIZABETH C. OULD, et al.
vs.
WASHINGTON HOSPITAL FOR FOUNDLINGS.
No. 70.

**Statement and Brief for defendant in Error.**

This is an action of ejectment brought by plaintiffs, the only heirs at law of Joshua Pierce, to recover the real estate described in the record.

The cause was heard by the Supreme Court of the District of Columbia, sitting in General Term, under the stipulation filed (record pp. 4 and 5,) and judgment was entered for defendant.

It is claimed by plaintiffs that the devise for the benefit of the defendant, as set forth on pages 4 and 5 of the record, is invalid, and that, by reason thereof, the title to the real estate therein mentioned and now enjoyed by defendant has become vested in plaintiffs as the only heirs at law of Joshua Pierce.

A regular legal title passed by the will of Joshua Pierce to Shuster and Clagett, and by their deed to the defendant, unless it can be successfully maintained that the trusts declared in the devise were void, and that such title thereupon vested in plaintiffs as will enable them to recover in this action. But, irrespective of the right of plaintiffs to sue at law, it is argued by them that, for several reasons, the devise in favor of the Foundling Hospital, to be created in the future, is void.

I.

The devise is assailed on the ground of uncertainty, (*i. e.*) that the objects and persons provided for are so uncertain that the devise is not enforcable by the Courts.

Plaintiffs concede that the validity of the devise in this case would be sustained in any jurisdiction in which the Statute 43 Eliz., Ch. 4, is in force. It is said, however, that that statute is not in force in the District of Columbia, and that without its aid the purpose of the testator cannot be carried out.

It has been decided by this Court that the Statute of 43 Eliz., Ch. 4, is only declaratory of the then existing powers and jurisdiction of the Chancery Court, and that the administration of charitable devises was within the limits of the ordinary powers of the Chancellor.

*Inglis* vs. *Trustees Sailors' Snug Harbor*, 3 Pet. 135.

*Vidal* vs. *Girard*, 2 How 127.

*Perrin* vs. *Carey*, 24 How. 465.

The ordinary powers and jurisdiction of the English Chancellors in reference to the administration of charities were borrowed from the civil law which was most favorably disposed toward charities.

Story Eq. Jur., § 1136 *et seq.*

The principles and powers of the Court of Chancery in England at the time of the revolution, not altered by legislation and not inapplicable to our political institutions, are the same by which the Court of Chancery in Maryland is governed.

*Cunningham* vs. *Browning*, 1 Bland 299.

*Amelung* vs. *Seekamp*, 9 G. and J. 468

*Carroll* vs. *Lee*, 3 G. and J. 504.

4 G. and J. 493; 7 G. and J. 208; 7 Md. 146.

And the same rule applies to the District of Columbia.

It is said, however, that the decisions of the Courts of Maryland show that such a devise as that under consideration would not be sustained in that State.

Of the Maryland cases cited in support of this position, only one was decided prior to February 27, 1801, after which date the decisions of the courts of Maryland would be of no greater authority in the District of Columbia than those of any other State.

In the single case alluded to (*Lingan* vs. *Carroll*, 3 H. & McH., 333), no question was made as to the validity of the devise, and no reasons given why it should be deemed void. The argument related exclusively to the conflicting rights of heirs at law and residuary legatees.

In any event the conclusions of the Court in this and the later Maryland cases are based upon the assumption that in England the Chancellor had no power to administer charitable trusts prior to and independent of 43 Eliz., ch. 4.

The examination of the original records in England made by defendants' counsel in *Vidal* vs. *Girard*, has shown that in this respect the conclusion of the Maryland Courts was based on false premises.

Accordingly, this Court, after the results of the examination of counsel in the case of *Vidal* vs. *Girard* had been brought to its attention, modified the views previously expressed by it in *Baptist Ass'n* vs. *Hart*, 4 Wheat., 1.

II.

The devise is further assailed, on the ground that it tends to create a perpetuity.

It is claimed that the devise in favor of the future Foundling Hospital is an executory devise, being a devise over of a fee on a certain contingency, after a prior

devise of the same fee. And as the contingency on which the devise in favor of the hospital was to take effect might occur beyond the conventional period of a life or lives in being and twenty-one years after, it is maintained by plaintiffs that the devise was too remote, and consequently void.

There are several answers to this position—

First. To treat this as an executory devise is to treat it as if it was substantially a devise first to Shuster and Claggett in fee, and in case a Foundling Hospital should be created, then, over to such hospital. In this view of the case, if the devise over to the hospital should be void, because made on a contingency too remote, it would simply follow that the original devise to Shuster and Claggett would stand good, and the contingent devise over would fail; but this would give no title to the plaintiffs.

Secondly. If this be an executory devise, upon a fair construction of the will, it appears to have been intended by the testator that it should go into effect within lives in being.

In *Inglis* vs. *Trustees Sailors' Snug Harbor*, 3 Peters, 99, the Court drew the conclusion of fact that the testator intended the devise to vest within the permitted time; and this *intention* of the testator was carried out, although in that case the devise was to a corporation to be created "*as soon as possible.*"

The devise in the case at bar is substantially the same in respect to the time of the ultimate vesting of the estate, as in the case of *Inglis* vs. *Trustees of Sailors' Snug Harbor.*

There are reasons apparent on the face of the will of Joshua Pierce which show that the testator intended that the trusts should be fully executed within the permitted period.

The executors are required to pay the taxes, &c., from the testator's *general estate*. All the trusts limited in the will, except that for defendants' benefit, expire, and the fee simple in each case vests at the end of a life or lives in being and twenty-one years afterwards. So that, after the termination of lives now in being, there will be no *general estate* remaining from which these taxes and assessments can be paid. This fact must have been apparent to the testator.

Throughout this clause of the will, too, the testator refers only to Shuster and Claggett when he uses the word "Trustees," without adding "their heirs or successors." He seems, therefore, to have placed an individual confidence in Shuster and Claggett when recommending that "said Trustees" shall select an institution which shall not be under the control of any one religious sect.

So this Court might fairly conclude, in the case at bar, that the testator *intended* the title to vest within the time allowed by the rule against perpetuities.

Thirdly. This is not a case of executory devise.

An executory devise of a fee upon a fee, arises where the will gives a legal fee to one person, and then on a certain contingency takes it away from that person and gives it to another. The devise over takes effect as a legal estate by force of the will itself, without any act of the first devisee, and without the aid of the statute of uses, and supersedes and defeats the first estate.

In this case, the title of the hospital is created by a distinct and voluntary act of the devisees, viz: a conveyance made in pursuance of a power conferred and a trust imposed on them. It does not defeat but grows out of the former estate, and is, so to speak, a continuation of it. It is, in short, not an executory devise, but a future,

contingent trust, engrafted on the original devise of the legal fee.

The will gives a joint life estate to Shuster and Claggett, with a remainder in fee simple to the survivor.

2 Blacks., ch. 12, p. 180, note 2.

It creates a power to approve and select a corporation to which the property may be afterwards conveyed, and a trust to convey to the corporation so selected. The power does not follow exactly the estate. It is given first to the two trustees during their joint lives, and so far is coincident with the estate. It is then given to the survivor, but not to his heirs as the estate is, but to their successors in the trust. What is meant by the terms "successors, &c.," is not very clear.

Fourthly. The rule against perpetuities is applicable to powers and trusts, but authorities seem to recognize this distinction, viz: that whereas a direct executory devise is void, if by possibility it may not take effect within lives in being and twenty-one years after; yet a power, as *e. g.*, a power of sale, though not in terms limited to the prescribed period, would not be absolutely void, but might be validly exercised within the period.

*Wood* vs. *White*, 2 Keen, 664, and 4 Mylne & Craig, 460.

*Biddle* vs. *Perkins*, 4 Simons, 135.

*Powis* vs. *Capron*, 4 Simons, 138.

*Waring* vs. *Coventry*, 1 Mylne & Keen, 248.

*Boyce* vs. *Hanning*, 2 Crompton & Jervis, 329.

*Wallis* vs. *Freestone*, 10 Sim., 225. Sugden Powers, 459.

*Nelson* vs. *Callow*, 15 Sim., 353.

*Ferrand* vs. *Wilson*, 4 Hare, 377–381; Sug. Pow., (3 Eng. Ed.,) 146; Ib. (6 Ed.) Vol. 1, p. 181; Vol. 2, p. 494; Preston Essay on Abst., Vol. 2, p. 158. 1 Jarman Pow. Dev., 248, 388; 7 Jarm. Con., 538; Saunders' Uses. & Trusts, 194, 195.

Mr. Lewis, (on Perp., 569,) after reviewing all the authorities, says: "Upon the whole subject of these special powers, it must be admitted that a strong disposition is discernible in our judges of law and equity towards a moderate relaxation of the established principles of the laws against perpetuities in favor of unlimited powers, *when their actual exercise is confined within the legal limits;* although, as all bounds to rules founded on notions of expediency only are merely arbitrary, it is impossible to say how far a respect for past professional laxity and general inconvenience may lead to a disregard of the strict line of principle and analogy."

It cannot be said that, because this cause is before a Court of Law, defendant is not entitled to the benefit of these general principles in regard to perpetuities, for the rule against perpetuities is administered in the same way both at law and in equity. (Lewis Perp., 169.) And besides, if a Court of Equity would sustain the devise, a Court of law must hold that there is no resulting use to the plaintiffs.

Fifthly. The power in this case is not one continuous and undivided power given to the owners of the fee simple, but it is given in succession to different persons.

*First.* It is given to the owners of the joint life estate. It would terminate with that estate, but that it is afterwards given to the survivor, and to the successors in the trust. Now, if it be true that the exercise of the power by successors in the trust might be too indefinitely remote, yet the power to the joint life tenants, would necessarily be exercised within the period, and so much of the power would be valid. And in point of fact it was so exercised. (Record p. 5.)

2 Preston Abst., 158.

*Boyce* vs. *Henning*, 2. Cr. & Jer. 334.

*Ferrand* vs. *Wilson*, 4 Hare 377.

And, finally, the rule against perpetuites is not applied to charitable uses.

If an immediate present gift be made for charitable purposes, although the time for its application be indefinite and dependent upon some future contingency, the possibility that the contingency will be too remote, does not invalidate the gift.

*Sinnett* vs. *Herbert*, 7 L. R., ch. 240 ;
1 Jarman, Wills, 3d Ed., p. 223 ;
*Chamberlayne* vs. *Brockett*, L. R. 8, ch. 206 ;
*Att'y General* vs. *Bishop of Chester*, 1 Bro., ch. 444.
*Henshaw* vs. *Atkinson*, 3. Madd. 306.
*Att'y General* vs. *Craven*, 21 Beav. 392.

On the whole, then, it is submitted that the judgment for the defendant ought to be affirmed.

WALTER S. COX,
HANNA & JOHNSTON,
*for defendant in Error.*